IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of case

Criminal Appeal No.1848/2001

Date of decision: 27.9.2004

For the approval of:

Hon'ble Mr. Justice B. C. Kandpal

Hon'ble Mr. Justice J. C. S. Rawat

- Whether the order/judgment should be sent to the reporters for reporting? Yes

- Whether the reporter be allowed to see the judgment? Yes

Dated 27.9.2004

LSR

IN THE HIGH COURT OF UTTARANCHAL,

AT NAINITAL

Criminal Appeal No. 1848/2001

Hasmat Khan S/o Manfool Khan
R/o Subhash Colony Ward No. 17,
P.S. Rudrapur, District Udham Singh Nagar
.....Appellant.

Versus

State of Uttaranchal ..... Opposite Party.

Mr. S.K.Mandal Learned counsel for the appellant.

Learned A.G.A. for the State.

Coram: **Hon'ble B.C. Kandpal J.**
Hon'ble J.C.S. Rawat J.

Date of Delivery: - September 27, 2004

Per: Hon'ble J.C.S.Rawat, J.

1. This criminal appeal has been preferred by the appellant-Hasmat Khan against the judgment and order dated 8-10-2001 passed by the then learned Sessions Judge, Udham Singh Nagar in S.T. No.300/2000, convicting the appellant for an offence punishable under sections 302 and 323 I.P.C. and sentencing him for 'life imprisonment' under section 302 I.P.C. and six months R.I. under section 323 I.P.C. Both the sentences were ordered to run concurrently.

2. The brief facts giving rise to this appeal are that there was an old enmity between appellant Hasmat Khan and Sharafat Khan (deceased) as a criminal case was pending in the court of Chief Judicial Magistrate, Udham Singh Nagar in which Hasmat Khan (appellant), Islam Khan, Nanhe Khan and his wife were the accused. The said case was fixed on the date of incident. Hasmat Khan (appellant) was pressing Sharafat Khan deceased for compromise. So Sharafat

Khan did not attend the court on the date fixed. On the date of incident, i.e. 20.4.2000 at 6.00 p.m. the complainant was sitting in his house and heard the voice loudly of Sharafat Khan deceased and Hasmat Khan. Hasmat Khan appellant brought a “DAV” (a sharp edged cutting weapon) from his house and told that he would not leave Sharafat Khan alive. Hasmat Khan appellant ran towards Sharafat Khan deceased having “DAV” in his hand and Sharafat Khan deceased tried to escape himself and ran towards Subhash colony and when he was at the turn of Banga plot the appellant attacked on Sharafat Khan thrice by “DAV” which hit on his head and neck. Sharafat Khan fell down and died on the spot. The incident was seen by Navi Khan (PW1), Bhure (PW2) and other persons of the vicinity. The appellant after killing Sharafat Khan ran towards Mandi gate then Soni S/o Om Prakash (PW4) came in front of the appellant and the appellant in his defence pushed Soni by “DAV” and thereafter the appellant ran away. Soni (PW4) also received injuries and he was brought to the hospital.

3. Navi Khan (PW1) lodged written report (Ex ka1) on 20.4.04 at 7.15 p.m. at P.S. Rudrapur. On the basis of written report (Ex ka 1) constable Ghanshyam Singh (PW8) prepared FIR (Ex ka 15) and registered a case U/s 302 IPC against the appellant vide G.D. entry (Ex ka 16). The appellant came to the police station on the same day at 7.20 p.m. and handed over “DAV” to the police and recovery memo (Ex ka 5) was prepared by S.I. Radheshyam Sharma and the “DAV” was sealed. The investigation was entrusted to S.H.O. Rajan Tyagi (PW7).

4. Sonu (PW4) was examined by Dr. Suresh Kumar (P.W.5) on 24.4.2000 at 7.20 P.M. and following injuries were found on his person:-

1- A red lacerated wound 4 cm x 1 cm x muscle deep on the forehead, just above the right eyebrow.

2- A contusion 5 cm x 4 cm on the right side of the face above the right maxillary area of fact and below the right lower eye lid, bruise in colour.

5. In the opinion of the doctor the injuries were caused by blunt and hard object.

6. The Investigating Officer visited the place of occurrence and prepared site plan (Ex ka 6). The Investigating Officer took blood stained earth and simple earth from the place of occurrence and prepared recovery memo (Ex ka 2). The Investigating Officer also prepared panchayatnama (Ex ka 7) of the dead body, photo lash (Ex ka 8), challan lash (Ex ka 9). The Investigating Officer also prepared report (Ex ka 10) to C.M.O., report (Ex ka 11) to R.I. The dead body was sealed on the spot and was sent to mortuary.

7. The autopsy on the dead body of the deceased was conducted by Dr. S.C. Tamta (P.W.6) on 21.7.2000 at 2 p.m. The Medical Officer had noted the following ante-mortem injuries on the dead body of deceased Sharafat Khan vide post mortem report (Ex ka 4).

1. Incised wound on left side of face extending from left nostril to bank of head, 26 cm x 5 cm x bone deep. All soft tissue, muscle being vessels of neck and bone cut through and through as wound.

2. Incised wound on left side of fact 6 cm above the injury no.1. Size 16 cm x 3 cm x bone deep extending from left ear pinna of left eyebrow. All soft tissue, muscles and vessels and bone were clean cut.

3. Incised wound 3 cm x 1.5 cm x muscle deep right side of face 3 cm below angle of mouth.

4. Incised wound right side of chest 4 cm below the steroid nodels, size 3 cm x 1 cm x bone deep.
5. Lacerated wound 4 cm x 3 cm x muscle deep on right shoulder.

8. The cause of death was due to shock and hemorrhage and as a result of ante mortem injuries.

9. The weapon used in the commission of crime i.e. “DAV” and samples of blood stained earth and simple earth and clothes were sent for chemical examination on 7.6.2000 in sealed bundle. The report of the chemical examiner is Ex ka 17. After completing the investigation charge sheep (Ex ka 14) was submitted against the appellant.

10. The appellant was charged for an offence punishable under section 302 I.P.C. and 323 I.P.C. He denied the charges and pleaded not guilty.

11. In order to bring home the guilt of the appellant the prosecution examined in all 8 witnesses. Navi Khan (P.W.1) complainant, Bhura (P.W.2) and Navi Sher (P.W.3) are the eye witnesses of the incident. Sonu (P.W.4) is the injured witness. Dr. Suresh Kumar (P.W.5) had examined injured Sonu and proved injury report (Ex ka 3). Dr. S.C. Tamta (P.W.6) conducted autopsy on the dead body of deceased Sharafat Khan and proved post mortem report (Ex ka4). Inspector Rajan Tyagi, (P.W.7) has investigated the case. Constable Ghanshyam Singh (P.W.8) proved chick report (Ex ka 15) and G.D. entry (Ex Ka 16).

12. The accused-appellant in his statement recorded under section 313 Cr.P.C. denied the prosecution case and stated that he has been falsely implicated in the

case. He has filed certain documents Ex Kha 1to Ex Kha 7 in defence.

13. The learned Sessions Judge after appreciating the evidence on record found the appellant guilty under section 302 IPC for committing murder of Sharafat and causing injuries to Sonu (PW4) and convicted and sentenced the appellant as above.

14. We have heard the learned counsel for the appellant and the learned A.G.A. and perused the evidence on record.

15. At the out set it need to be mentioned that it is not disputed that there was an old enmity between the appellant and the complainant party on account of litigation pending in the court of Chief Judicial Magistrate Rudrapur between the parties. It is not further disputed that the deceased Sharafat Khan met a homicidal death on account of the injuries sustained by him on the date of occurrence. Dr. S.C. Tamta PW6 also deposed before the Court that he conducted the postmortem on the dead body of the deceased on 21-07-2000 at 02 p.m. and found that the death occurred about one day before. The doctor further opined that the death might be caused on 20-04-2000 at about 06 p.m. due to shock and hemorrhage resulting from ante mortem injuries caused by a sharp edged weapon.

16- Now we have to consider whether the appellant Hasmat Khan was responsible for the injuries sustained by Sharafat Khan deceased. The prosecution case rests on the direct evidence of the eye witnesses. The prosecution examined PW-1 Navi Khan, complainant, Bhura, PW-2, and Sonu PW-4 as eye witnesses. According to the prosecution they have not supported the prosecution version and they were declared hostile by the prosecution. The prosecution

further adduced the evidence of PW-3 Navi Sher who was also the eye witness of the incident. PW-3 Navi Sher has stated in his evidence that he had a tailoring shop in Subhash Colony, Rudrapur and he knew both the parties, Hasmat and Sharafat Khan. On 20-04-2000 at about 06 p.m. he was going to deliver the clothes to Sharafat deceased at his residence. When he reached at the residence of Sharafat he saw that the deceased Sharafat Khan and appellant Hasmat Khan were hurling abuses. The appellant was pressing Sharafat Khan deceased for compromise in the case pending in the Court of Chief Judicial Magistrate, Udham Singh Nagar in which the appellant and his brother Aslam Khan were the accused. His brother Aslam Khan was in jail in that case. The case was fixed before the Chief Judicial Magistrate on 20-04-2000. The deceased Sharafat Khan did not attend that Court on the said date. Meanwhile Hasmat Khan appellant brought a “DAV” (a country made sword) from his house and threatened Sharafat Khan to kill him. The appellant Hasmat Khan ran towards Sharafat Khan deceased having “DAV” in his hand and Sharafat Khan tried to escape and started to run away towards Subhash Colony. When he reached at the turn of Banga plot the appellant attacked on Sharafat Khan by “DAV”, which hit him on his head and neck. Sharafat Khan fell and died spontaneously. The appellant after killing Sharafat Khan ran towards Mandi Gate. When the appellant was running towards Mandi Gate Sonu PW-4 came in front of the appellant and he pushed Sonu by “DAV”. Sonu PW-4 sustained injuries on his person. Thereafter the appellant ran away. The witness was cross-examined at length by the defence but nothing could be elicited from his testimony. We

have scanned the evidence of Navi Sher PW-3 and his evidence is quite natural and trustworthy.

17- The learned counsel for the appellant submitted that the evidence of PW-3 Navi Sher is not believable because his name has not been mentioned in the F.I.R. The learned A.G.A. has refuted the contention. We do not find any substance in the submission of defence. There is no requirement of law for mentioning the names of all the witnesses in the F.I.R., the object of which is only to set the criminal law in motion. PW-3 Navi Sher had a tailoring shop at Subash Colony itself and he was going to deliver the clothes to the deceased. As such his presence at the spot is natural. The learned Sessions Judge has rightly held that Navi Sher PW-3 was a natural witness of the incident and we do not see any reason to take a different view particularly when this question has been fully noticed and discussed by the learned Sessions Judge. We are in agreement with the findings of the learned Sessions Judge in this regard.

18- The learned counsel for the defence further submitted that PW-3 Navi Sher is a chance witness and his testimony cannot be relied upon. The learned A.G.A. refuted the contention. PW-3 Navi Sher has categorically stated in his evidence that he had a tailoring shop in Subhash Colony in the same vicinity and he knew both the parties. On 20-04-2000 he was coming to deliver the clothes to the deceased. His presence is natural and his evidence cannot be disbelieved on this score alone. The learned Sessions Judge has rightly rejected the contention of the learned counsel for the defence.

19- Thus, PW-3 Navi Sher had no enmity with any of the party. There is nothing in the cross-examination to

impeach his testimony and he had given the entire picture of the occurrence in his evidence and his evidence is credible and cogent.

20- The evidence of PW-3 Navi Sher further stands corroborated by the medical evidence. The deceased died on 20-04-2000 and his post mortem was conducted by Dr. S.C. Tamta PW-6 and the doctor opined that the death might be caused on 20-04-2000 at about 06 p.m. due to shock and haemorrhage resulting from ante mortem injuries caused by sharp edged weapon. The injuries were also found on the head, neck and shoulder of the deceased. Thus, the medical evidence corroborates the date and time of the death.

21- The incident took place on 20-04-2000 at about 06 p.m. and the matter was reported at the police station on the same day at 07:15 p.m. The F.I.R. came into existence with promptness, which rules out any occasion for outside consultation or manipulation. The F.I.R. was scribed by PW-1 Navi Khan. The F.I.R. in a criminal case particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the F.I.R. is to obtain earliest information regarding the circumstances in which the crime was committed including the names of the actual culprits and the parts played by them, the weapon, if any, used in the crime. The delay in lodging the F.I.R. often results in embellishment which is a creature of afterthought. On account of delay in lodging the F.I.R. not only gets benefit of the advantage of spontaneity, danger also creeps in the introduction of coloured version or exaggerated story.

22- The learned defence counsel further submitted that the prosecution has not proved the report and the F.I.R. and as such it cannot be relied. The learned A.G.A. refuted the contention. The prosecution adduced the evidence of Navi Khan PW-1 informer of the F.I.R. who was declared hostile by the prosecution but in his cross-examination he has admitted that he handed over the written report Ex. Ka-1 at the police station and he has put this thumb impression on the report. Thus, PW-8 Ghanshyam Singh proved the F.I.R. Ex. Ka-15 prepared on the basis of report Ex. Ka-1. No enmity has been alleged by the appellant against PW-8 Ghanshyam Singh. Hon'ble Supreme Court in **Krishna Mochi and others versus State of Bihar, reported in 2002 Supreme Court cases (cri) 1220** has held as under:

> "It has been further submitted that the informant, Satendra Kumar Sharma has not been examined as such, the first information report cannot be used as a substantive piece of evidence inasmuch as on this ground as well the appellants are entitled to an order of acquittal. The submission is totally misconceived. Even if the first information report is not proved, it would not be a ground for acquittal , but the case would depend upon the evidence led by the prosecution. Therefore, non-examination of the informant cannot in any manner affect the prosecution case."

The contention of the learned defence counsel has no substance.

23- The evidence of the prosecution with regard to the murder of the deceased Sharafat Khan by the appellant further stands corroborated by the motive preferred by the prosecution that a criminal case was pending in the court of Chief Judicial Magistrate, Udham Singh Nagar between Hasmat Khan appellant and Sharafat Khan deceased in which Hasmat Khan appellant, Aslam Khan,

Nanhe Khan and his wife were the accused. Accused Aslam Khan had been in Jail for the last six months. The said case was fixed in the court on the date of incident. Sharafat Khan did not attend the court on the date fixed. So Hasmat Khan appellant was pressing Sharafat Khan deceased for compromise. The deceased was not acceding to his demand. As such the appellant was annoyed with the deceased. Thus there was sufficient motive to kill the deceased.

24- The prosecution has also produced the evidence that the appellant himself came to the police station and he surrendered before the police and also handed over the blood stained “DAV” to the police. PW-7 Inspector Rajan Tyagi has deposed this fact in his evidence. PW-8 Constable Ghanshyam Singh has also mentioned this fact in G.D. entry no.42, Ex.Ka-16. The said “DAV” was kept under sealed cover and sent for chemical examination. The surrender of the appellant at the police station as well as the handing over of the “DAV” by the appellant immediately after the incident further corroborates the evidence of the prosecution. The learned defence counsel contended that PW-8 Ghanshyam Singh has stated in his evidence that the said “DAV” was thrown when the appellant was running towards Mandi Gate after committing the offence. The defence further contended that if the “DAV” had been thrown there, there is no question to further surrender “DAV” at the police station. The learned A.G.A. refuted the contention. The testimony of PW-7 and PW-8 is totally credible and cogent. The “DAV” was handed over to the police immediately after the incident by the police. This fact has been mentioned in the G.D. report Ex.Ka-16 as well as in recovery memo Ex.Ka-5

prepared at the police station. There is isolated statement that the “DAV” was thrown immediately after the incident and his statement came during cross-examination. This statement has not been got clarified by the defence. Sometimes, because he is a bucolic witness and is not able to understand the question put to him by the skillful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. The learned Session Judge has rightly rejected the contention of the learned defence counsel and we are in agreement with the findings of the learned Session Judge. As such the contention of the defence is not sustainable.

25- The ocular testimony of the prosecution further stands corroborated from the report of the Forensic laboratory Ex. Ka-17 in which it has been indicated that the “DAV”, Pant, Shirt and the papers which were sent for examination had human blood and it was further opined that the blood was of group B. thus the report Ex. Ka-17 further strengthens the oral evidence of PW-3 Navi Sher that the “DAV” was used to commit the murder of the deceased as the blood group of the Pant, Shirt and “DAV” was found of group B.

26- The appellant has been convicted U/s 323 IPC. The appellant has been charged that he pushed Sonu PW 4 by “DAV” and caused voluntarily hurt to him. Sonu was produced in evidence as PW 4 and stated in his statement that children pushed him when they were playing in the Mohalla and received injuries. The appellant did not cause any injury to him. The learned Sessions Judge erred in holding that the appellant

caused Sonu simple injuries. When PW 4 Sonu who is the injured, himself has been declared hostile and he has not corroborated his injuries as alleged by the prosecution. He cannot be convicted U/s 323 IPC and the appellant deserves to be acquitted under section 323 IPC.

27. In view of the above discussion we find that the learned Sessions Judge has rightly found the appellant guilty for the offence of committing the murder of Sharafat Khan and he has also rightly convicted and sentenced the appellant under section 302 IPC. However, the appellant deserves to be acquitted under section 323 IPC.

28. The appeal is partly allowed and he is acquitted for the charge leveled against him under section 323 IPC. However, the conviction and sentence awarded against the appellant by the learned Sessions Judge, under section 302 IPC for committing murder of Sharafat Khan by the appellant are maintained.

29. Let a copy of this judgment alongwith the record of the case be sent to the trial court for needful compliance under intimation to this court within two months positively.

(J.C.S. Rawat J) (B.C.Kandpal J)

September 27, 2004